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In the Supreme Court of the United States

MELVIN T. SMITH,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Writ of Certiorari to the Appeals Court of the Commonwealth of Massachusetts

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliation organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. Few protections are more basic and more essential to criminal defendants than the guarantee that an accused will not be tried more than once for the same offense; it is of vital interest to NACDL's membership that the protection against double jeopardy remain intact and vigorous.

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[1] Pursuant to Rule 37.6, the *amicus* certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than the *amicus*, its members, or its counsel have made a monetary contribution to this brief's preparation or submission.

Letters from the parties consenting to the filing of this *amicus* brief have been lodged with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

After the prosecution rested its case in Petitioner's trial for unlawful possession of a firearm, assault and battery with a dangerous weapon, and armed assault with intent to murder, the trial judge granted Petitioner's motion for acquittal on the firearms charge, stating on the record that the Government had produced "not a scintilla of evidence" to satisfy one of the statutory elements of the offense. The acquittal was then recorded on the docket; the defendant and his co-defendant put on their cases; and a charge conference was held. But after a recess, the prosecution presented additional authority and argument to the judge on the firearms charge, and the judge revoked her acquittal. The jury was permitted to consider the disputed count, and convicted on it.

The Appeals Court held that "double jeopardy protections were not violated in these circumstances because the judge's correction of her ruling did not require a second proceeding" and did not subject Petitioner "'to a second trial before a second trier of fact.'" 788 N.E.2d at 982. This holding, if allowed to stand, would represent a dangerous erosion of the protections of the Double Jeopardy Clause, for two reasons.

First, the rule promulgated by the Massachusetts court — that the Double Jeopardy Clause is not violated by a reversed acquittal so long as there is no "second trial before a second trier of fact" — would, if consistently applied, eviscerate the protections of the Clause by conditioning its availability on irrelevant factors outside the control of either the court or the defendant.

Second, the holding of the Appeals Court deals a blow to the core principle that underlies the protection against double

jeopardy: that the government cannot be permitted, after it has failed to convince a court of a defendant's guilt, to return a second time with a ***new, refined argument***, and try again. As this Court has explained multiple times in various contexts, allowing the government more than one opportunity to test out theories and arguments is fundamentally unfair and poses a significant risk that even an innocent defendant will eventually be convicted.

ARGUMENT

I. THE MASSACHUSETTS RULE MAKES NO SENSE AND LEADS TO ABSURD RESULTS.

The Petitioner rightly argues that the rule promulgated by the Appeals Court — that the Double Jeopardy Clause is violated only when a defendant is subjected to a "second proceeding" in front of a "second trier of fact" — is at odds with this Court's well settled constitutional precedent. Even if that were not the case, however, it would be clear that the Massachusetts rule — and the regime that it would produce — is unfair, unworkable, and subject to irrational inconsistencies.

Under the rule espoused by the Appeals Court, the happenstance of procedural posture controls the availability of the protection against double jeopardy. The continuing availability of a single factfinder in a single proceeding cannot be the touchstone of double jeopardy analysis; if it were, a host of irrelevant factors would determine dispositively whether a defendant's double jeopardy rights have been violated.

A. The Judge/Jury Anomaly

The Appeals Court's rule establishes an irrational distinction between judges and juries. Our Constitution would not allow a jury that has acquitted a defendant to return to the courtroom the following day and recant its verdict, even if

the recantation were based on jurors having learned that a legal instruction had been misinterpreted in the jury room.

That prospect is not purely hypothetical. Imagine a bifurcated criminal trial in which the jury acquits the defendant on one charge but convicts on a second. During the sentencing phase, the jury hears evidence that demonstrates to its satisfaction that the acquittal on the first charge was error. The jury cannot be permitted to reverse its acquittal in such circumstances.

But that scenario is functionally identical to what happened here. In both cases, a single factfinder, in a single proceeding, hears evidence and reaches a verdict. In both cases, a verdict of acquittal is reversed upon the decisionmaker's subsequent conclusion that a point of law has been misunderstood. According to the Appeals Court, the Double Jeopardy Clause permits retrial here, even though it could not in the case in which a jury makes a decision and then reverses itself.

One consequence of the Massachusetts rule, then, is that an acquittal is treated differently, for purposes of the Double Jeopardy Clause, if it comes from a judge than if it comes from a jury. But the settled caselaw says otherwise: There is "no 'legal distinction' between judge and jury with respect to the invocation of the protections of the double jeopardy clause." *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 573 (1977); see also *Smalis* v. *Pennsylvania*, 476 U.S. 140, 145 (1986); *Arizona* v. *Rumsey*, 467 U.S. 203, 210-12 (1984); *Hudson* v. *Louisiana*, 450 U.S. 40, 44-45 & n.5 (1981); *Sanabria* v. *United States*, 437 U.S. 54, 64 & n.18 (1978); *Fong Foo* v. *United States*, 369 U.S. 141, 143 (1962).

B. The Multiple Count Anomaly

The bifurcated-trial scenario highlights a second difficulty in applying the Appeals Court's rule. While one might strain to distinguish Mr. Smith's case from that of the defendant whose jury returns to the courthouse uninvited the following morning bent on conviction, the comparison is even closer when the jury remains impaneled for some reason after voting to acquit.

According to the Appeals Court, Mr. Smith was not "otherwise prejudiced" by the judge's reversal of the directed verdict because "[t]he jury were not aware that the judge had allowed the motion and the correction of the ruling was made before closing arguments." *Commonwealth* v. *Smith*, 58 Mass. App. Ct. 166, 171, 788 N.E.2d 977, 983 (2003). Presumably, had the jury learned of the directed verdict, jeopardy would have terminated. Certainly, had the jury been discharged following the judge's ruling, subsequent reversal would have been barred.

The problem is this: Mr. Smith's jury was not informed of the directed verdict ***only because*** other charges remained pending against him. For that reason only, the trial continued and the jury remained impaneled and unaware of the ruling. Under the rule of the Appeals Court, then, jeopardy terminates upon a judgment of acquittal for a defendant facing only one charge, but jeopardy continues for a defendant acquitted of an identical offense on identical grounds until the resolution of other, perhaps unrelated charges. The finality of the judge's ruling for Double Jeopardy purposes varies based on whether the judge has granted a full or a partial acquittal. There is no constitutional basis for importing such absurdities into the Double Jeopardy Clause, or for such disparate treatment of such similar defendants.

C. The Multiple-Defendant Anomaly

The Appeals Court's rule would also allow conviction of a fully acquitted defendant whose co-defendants remain on trial. If the Double Jeopardy Clause is not violated by the reconsideration of an acquittal, as long as a single proceeding continues with a single fact-finder, it would appear that a defendant who has been acquitted of all charges — and sent

home — could nonetheless be recalled and subsequently convicted, at least if the jury remains unaware of his temporary absence.

This anomaly was discussed during the oral argument in this Court's consideration, last term, of *Price* v. *Vincent*, 538 U.S. 634 (2003). Responding to the espousal, by the United States (as *amicus* in *Price*) of a rule nearly indistinguishable from the Massachusetts decision at issue here, one Justice of this Court asked the following question:

> What – what if you have a series of defendants in a – in a case and it's being tried, and at the close of the prosecution's evidence, the judge dismisses the indictment against one of the defendants, but keeps on so the jury is still there?

Price v. *Vincent*, 2003 WL 1989564, at *24, 71 U.S.L.W. 3695, 16 Fla. L. Weekly Fed. S 281 (Oral Argument) (U.S. Apr 21, 2003), Oral Argument, (No. 02-524). The United States responded to this question by arguing that the Court could decide whether "there's constructively or through legal fiction the discharge of the jury with respect to that defendant even though the actual jury is still there." *Id.* at *25.

The inquiring Justice did not appear receptive to the Government's constructive discharge theory ("That's an extraordinary doctrine." *Id.* at *25), and for good reason: Finding a constructive discharge with respect to one defendant would highlight the difficulty inherent in the Massachusetts rule. If a full acquittal of one defendant constitutes "constructive" discharge of the jury with respect to that defendant, why does a finding of acquittal on one ***charge*** not require "constructive" discharge of the jury with respect to that charge?

Neither the Massachusetts Appeals Court, the respondent in *Price*, nor the United States as *amicus* in that case, has offered any better suggestion for avoiding the problem created by partial acquittals. Thus, if this Court were to adopt the position advocated below (and in *Price*), a judge who grants

a motion for acquittal on all counts against all defendants renders a final verdict that bars further proceedings. However, if one defendant is completely acquitted and another is not, the trial proceeds, and the judge may, at any point before closing argument, reverse her decision and require the acquitted defendant once again to stand trial. It is incumbent upon the Respondent here to offer some theory that would explain how the protection of the Double Jeopardy Clause can vary depending on whether other defendants are being tried by the same jury.

II. THE RULE PROPOUNDED BY THE COURT OF APPEALS IS INCONSISTENT WITH THE WISE AND WELL ESTABLISHED MAXIM THAT THE GOVERNMENT BE AFFORDED ONLY "ONE BITE AT THE APPLE" WHEN SEEKING TO CONVICT A PERSON OF A CRIME.

One could attempt to portray Mr. Smith's case as unremarkable and outside the core protections of the Double Jeopardy Clause. After all, the judge's decision to reverse her ruling occurred before the jury heard closing argument and before any deliberation. At least according to the Appeals Court, Mr. Smith was not "otherwise prejudiced" by the reversal of the directed verdict.

But this is not a situation of "no harm, no foul." Mr. Smith's trial implicates the very core values of the Double Jeopardy Clause for a simple reason: The judge reconsidered her ruling only after the prosecution, having failed once to convince her of its position, returned a ***second*** time to make a ***second*** argument. To be sure, it is the position of this *amicus* that even a *sua sponte* reversal of the directed verdict would violate the Double Jeopardy Clause. But a reversal based on the government's unsolicited invitation to consider new and refined arguments is the very essence of a double jeopardy violation.

"[T]he underlying reason for prohibiting successive trials is to prevent the government from gaining the advantage of a test run during which it can test the strength of its own and the defendant's evidence, followed by 'another opportunity to supply evidence which it failed to muster in the first proceeding.'" RONALD J. ALLEN, WILLIAM J. STUNTZ, JOSEPH L. HOFFMANN, & DEBRA A. LIVINGSTON, COMPREHENSIVE CRIMINAL PROCEDURE 1353 (2001) (quoting *Burks* v. *United States*, 437 U.S. 1, 11 (1978)). Indeed, this prohibition against giving the government a second bite at the apple has repeatedly been characterized by this Court has "lying at the core of the Clause's protections," because it "prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction." *Tibbs* v. *Florida*, 457 U.S. 31, 42 (1982) (citing *Green* v. *United States*, 355 U.S. 184, 187-188 (1957); *United States* v. *DiFrancesco*, 449 U.S. 117, 130 (1980)).[1] This case thus presents a paradigmatic example of the type of danger against which the Double Jeopardy Clause was designed to protect.

The respondent can be expected to argue the slippery slope: A ruling by this Court in the petitioner's favor will allow defendants to take advantage of interlocutory misstatements — obvious errors of law, easily and quickly correctible — to engineer acquittals despite guilt. But that farfetched possibility is certainly not what happened here,

[1] See also, e.g., *United States v. Dixon*, 509 U.S. 688, 736 (1993) (Rehnquist, C.J., dissenting) (including "preventing the Government from gradually fine-tuning its strategy" as one principle justifying the protection against double jeopardy); *Grady v. Corbin*, 495 U.S. 508, 518 (1990) ("Multiple prosecutions also give the State an opportunity to rehearse its presentation of proof, thus increasing the risk of an erroneous conviction for one or more of the offenses charged."); *Lockhart v. Nelson*, 488 U.S. 33, 44 (U.S., 1988) (Marshall, J., dissenting) (State's "honing its trial strategies and perfecting its evidence through successive attempts at conviction" is a "classic double jeopardy evil").

where the judge made a considered decision and then reversed it only after renewed argument from the prosecution. And in any event the dangers of the rule espoused below plainly are far more ominous. The government must not be permitted to refine and re-fashion its theory of the defendant's guilt until it discovers one that works. As this Court has repeatedly cautioned, "[r]epeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance." *Tibbs*, 457 U.S. at 41. Indeed, it is fundamental that

> the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. *United States*, 355 U.S. 184, 187-88 (1957). The rule adopted by the court below thus cannot be squared with the most basic concerns that animate the Double Jeopardy Clause.

CONCLUSION

The judgment of the Appeals Court should be reversed.

Respectfully submitted.

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